

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BERNARD E. LOVE
Claimant

VS.

COLGATE PALMOLIVE
Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

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Docket Nos. 129,879 & 147,561
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ORDER

Claimant appeals from an Award entered by Administrative Law Judge Robert H. Foerschler dated January 10, 1996. The Appeals Board heard oral argument May 21, 1996.

APPEARANCES

Claimant appeared by his attorney Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance company appeared by their attorney Frederick Greenbaum of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Michael Wallace of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations as stated by the Administrative Law Judge in his Award. The Appeals Board has reviewed and considered the record itemized in the Award.

ISSUES

Claimant's Application for Review lists the following issues:

- (1) Nature and extent of claimant's work disability for the second injury.

- (2) Whether the Administrative Law Judge properly calculated the credit to be applied from benefits awarded under Docket No. 129,879 to the award made in Docket No. 147,561.
- (3) Whether claimant is entitled to an award of future medical benefits.
- (4) Whether claimant is entitled to unauthorized medical benefits for both accidents.

At the time of oral argument claimant also asserted that the Administrative Law Judge improperly applied the \$100,000 maximum to the total amount awarded in both cases.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds as follows:

Issue No. 1: The determination by the Administrative Law Judge that the claimant has a 40 percent work disability should be affirmed.

The Administrative Law Judge determined the nature and extent of claimant's disability by giving approximately equal weight to the opinions of two experts, Mr. Bud Langston and Mr. Richard Santner, regarding the claimant's ability to obtain or return to employment in the open labor market. The Administrative Law Judge then determined the ability to earn a comparable wage based upon a comparison of claimant's pre-injury wage to a post-injury wage in one of the positions, that as a bus driver, for which claimant applied after his injury.

Both parties disagree with the finding by the Administrative Law Judge. Respondent contends that the award should be limited to functional impairment because, according to respondent, there is a job with respondent, that of a scheduler, which the claimant retains the physical ability to perform. Respondent acknowledges there was no opening available as a scheduler and the job was never offered to the claimant. Respondent insists, nevertheless, the existence of the position which claimant could perform and the fact that it paid a comparable wage should limit claimant's award to a functional impairment.

The Appeals Board finds claimant should be awarded work disability. K.S.A. 44-510e creates a presumption that claimant has no work disability if he or she actually returns to work at a comparable wage. The Kansas Court of Appeals has determined that this presumption may be applied in cases where the claimant refuses to accept a job offered at a comparable wage. Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). In this case claimant was not working at a comparable wage and there is no indication that claimant was offered a job at a comparable wage.

The Appeals Board also considers it inappropriate to rely on the scheduler job to arrive at a 0 percent loss on the wage prong of the work disability test. The wage loss should be based upon a projection of what is probably or most likely to be the impact on claimant's future earnings based upon realistic possibilities. See Ronald J. Shultz v. A.H.R.S. Construction, Docket No. 163,570 (May 1994).

Claimant argues that the Administrative Law Judge improperly considered the wage of the bus driving position. Claimant asserts that his restrictions would prevent him from performing the job. The record does not, however, contain any medical opinion to support that conclusion. Claimant asked the Appeals Board to extrapolate from the restrictions

recommended. From our review of those restrictions we would not conclude, without expert testimony, that claimant could not perform that job. The Appeals Board finds it appropriate to base the wage-loss prong portion of the calculation on the wage for the bus driver position in this case. This was a job which was open and for which claimant applied. The wage for the job also appears to have been within the reasonable range of wages claimant was likely to earn after the injury.

The Administrative Law Judge also gave approximately equal weight to the wage-loss and labor-market loss factors. Doing so yielded a work disability of 40 percent. The Appeals Board therefore finds and concludes that the award based upon a 40 percent work disability should be affirmed.

Issue No. 2: The Award incorrectly calculates the credit for benefits paid under Docket No. 129,879.

Claimant argues and the Appeals Board agrees that the Administrative Law Judge has improperly calculated the number of weeks of unreduced compensation of the award in Docket No. 147,561. The correct calculations are reflected in the award stated below. The result was the Award gave an incorrect number of weeks to be paid at the full rate. It appears the Administrative Law Judge did not take into account the weeks of temporary total disability benefits during which the reduced rate does not apply.

Issue No. 3: Claimant is entitled to future medical upon proper application to the Director.

From the nature of the injury the Appeals Board finds claimant may need future medical treatment and it is appropriate, even in the absence of an express expert opinion that future medical will be required, to award future medical upon proper application and approval by the Director.

Issue No. 4: Claimant would be entitled to unauthorized medical expense up to the statutory maximum of \$350 for each of the two separate injuries. K.S.A. 44-510.

Issue No. 5: The statutory limit of \$100,000 applies to each separate claim. The Administrative Law Judge erroneously calculated the award in Docket No. 147,561 based upon the assumption that the statutory limit of \$100,000 acted as a cap to the amount recovered in both claims. Respondent argues the Administrative Law Judge correctly applied the cap because there was, in effect, only one accident. Respondent stipulated to accidental injury in two separately docketed claims. The Appeals Board finds from the evidence there were two accidental injuries and the \$100,000 would, therefore, be the limit on each of the two claims. This calculation is corrected in the award stated below.

AWARD

WHEREFORE, the Award by Administrative Law Judge Robert H. Foerschler dated January 10, 1996 is hereby modified as follows:

WHEREFORE, AWARDS OF COMPENSATION ARE HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of claimant, Bernard E. Love, and against the respondent, Colgate Palmolive, and its insurance carrier, Liberty Mutual Insurance Company, for accidental injuries sustained on June 24, 1988 and June 18, 1990 as follows:

Docket No. 129,879 (Injury of June 24, 1988)

The claimant is entitled to 66.43 weeks temporary total disability at the rate of \$256.00 per week or \$17,006.08 followed by 348.57 weeks at \$28.84 per week or \$10,052.76 for a 6 percent permanent partial general body disability making a total award of \$27,058.84 all of which is due and owing and is ordered paid in one lump sum less amounts previously paid.

Docket No. 147,561 (Injury of June 18, 1990)

The claimant is further entitled to 95.71 weeks temporary total disability at the rate of \$271.00 per week or \$25,937.41 followed by 215.86 weeks of permanent partial compensation at \$179.44 per week or \$38,733.92 and 103.43 weeks of permanent partial compensation at \$208.28 per week or \$21,542.40 for a total award of \$86,213.73 for the injury of June 18, 1990.

As of June 28, 1996 there will be due and owing 95.71 weeks temporary total disability compensation at \$271.00 per week in the sum of \$25,937.41 plus 215.86 weeks permanent partial compensation at the reduced rate of \$179.44 per week or \$38,733.92 and 3.0 weeks of permanent partial at the full rate of \$208.28 or \$624.84 for a total due and owing of \$65,296.17 which is ordered paid in one lump sum less amounts previously paid, followed by 100.43 weeks of permanent partial at \$208.28 or \$20,917.56, until fully paid or further order of the Director.

The Appeals Board adopts all other orders by the Administrative Law Judge.

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Frederick Greenbaum, Kansas City, KS
Michael Wallace, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director